

)	
)	
In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
ETC Annual Reports and Certifications)	WC Docket No. 14-58
)	
Rural Broadband Experiments)	WC Docket No. 14-259
)	

New York State, through its chief economic development agency, Empire State Development (“ESD”), hereby respectfully submits its reply comments in response to its Petition for Expedited Waiver (“Petition”) of the rules requiring the award of Connect America Fund (“CAF”) Phase II funding in New York through the Commission’s competitive bidding process.

The initial comments overwhelmingly support grant of the Petition to allow designated carriers in New York to access CAF Phase II funding in coordination with the State's existing broadband program. A number of New York carriers, including Verizon, FairPoint and other incumbent and competitive carriers, agreed that good cause exists to grant the waiver and that expeditious approval would greatly facilitate the deployment of broadband infrastructure in rural New York communities. Other parties, including the Pennsylvania Public Utilities Commission, confirmed that a waiver would promote the public interest by ensuring the efficient allocation of CAF resources and encouraging state funding of broadband services. There has also been substantial bipartisan support from New York's congressional delegation for the State's efforts

to maintain appropriate FCC funding levels within State and to coordinate such funding through a partnership between the State and the FCC. Finally, as discussed more fully below, the minimal opposition to the Petition was based on inaccurate factual and legal assertions of the waiver request and the many public interest benefits it would bring. The Commission should thus move quickly to allow the allocation of CAF funding in coordination with New York's broadband program, which would ensure that broadband infrastructure can be quickly deployed to unserved New York communities.

II. THE RECORD STRONGLY SUPPORTS GRANT OF THE EXPEDITED WAIVER

The record developed in this proceeding warrants expeditious approval of the Petition and waiver of the Commission's competitive bidding process in New York. As noted in a number of initial comments, good cause exists for rapid grant of the waiver due to the special circumstances arising from New York's broadband program. Many commenters also included ample support that the waiver would promote the public interest by facilitating the deployment of broadband services in New York and fostering federal-state coordination on broadband issues.

A. Good Cause Exists to Grant the Petition

A broad cross section of interested parties, including New York carriers, local educational institutions, and other state governments, strongly supported grant of the Petition. Importantly, these commenters concluded that good cause exists to grant the waiver due to the special circumstances regarding New York's ongoing broadband program. The local carriers supporting the Petition included Verizon, FairPoint as well as many of the small incumbent and competitive carriers that could provide broadband services to rural New York communities through the waiver. Verizon's recognition that good cause exists to grant the Petition is

particularly noteworthy given that it is the incumbent carrier in the affected territories. As such, it could be the party most affected by the proposal due to the potential for stiffened competition from financially-bolstered competitors upon grant of the waiver. Nevertheless, Verizon confirmed that the “significant amount of broadband funding provided by New York, the overlap between the CAF program and the New York program, and the timing differences between the two programs represent special circumstances that warrant grant of the requested waiver.”¹ The Pennsylvania Public Utilities Commission (“PA PUC”) also recognized that good cause exists to grant the expedited waiver due to New York’s “unique position” as a state that is currently implementing a large-scale broadband funding program.²

B. Grant of the Waiver Would Promote the Public Interest

In addition to demonstrating that good cause exists, many commenters agreed with New York’s assessment of the public interest benefits that would result from grant of the Petition. A number of local carriers noted that, by establishing a single auction process, a waiver would bring a “greater level of clarity and certainty” to their broadband planning activities.³ This certainty would provide them with the confidence necessary to participate in the federal and State broadband funding programs. The critical importance that grant of the waiver would have in facilitating the deployment of broadband infrastructure in rural New York communities was also well documented by commenters. Carriers such as Citizens Telephone of Hammond noted that a waiver would “undoubtedly assist in the goal of bringing high-quality broadband service to

¹ Comments of Verizon at p.4.

² Comments of the Pennsylvania Public Utilities Commission at p.4.

³ Comments of FairPoint Communications at p.1.

those areas of New York subject to the Phase II auction.”⁴ The Chazy and Westport Telephone Company also acknowledged that “private investment alone is not sufficient” in funding broadband services in the relevant New York communities.⁵ The Commission must take these local carriers’ views into account as they have the detailed local understanding of the challenges that have confounded the deployment of broadband infrastructure to these areas for many years.

Other commenters agreed with New York’s view that the waiver would help to facilitate the type of federal-state partnership that is essential to deploying broadband infrastructure in rural communities across the country. Clarkson University lauded the potential for such a partnership as an “incredible opportunity” to deliver “real results for New York residents.”⁶ Verizon similarly asserted that coordination of the federal and State broadband programs is “uniquely important because...New York’s program overlaps in significant respects with the CAF program.”⁷ The Oneida County Rural Telephone Company also noted that the funding certainty provided by the federal-state partnership would help to offset the “significant operating risk” of “deploy[ing] broadband infrastructure in some of the most rural areas of New York.”⁸

C. Strict Application of the Rules Would Frustrate Important FCC Objectives

In addition to highlighting the many public interest benefits, commenters agreed with New York’s assertion that strict application of the competitive bidding process rules in the State would frustrate a variety of important Commission CAF objectives. As noted in the Petition,

⁴ Comments of Citizens Telephone Company of Hammond at p.1.

⁵ Comments of the Chazy and Westport Telephone Company at p.1.

⁶ Comments of Clarkson University at p.1.

⁷ Verizon Comments at p.3.

⁸ Comments of The Oneida Rural County Telephone Company at p.2.

absent a waiver, there is the potential for the Commission and the State to fund different providers to deploy broadband in the same territories. This would result in the duplicative buildout of broadband facilities, which the FCC has long sought to avoid.⁹ FairPoint agreed with this assessment, noting that the Petition “mitigates concerns presented by holding separate and uncoordinated federal and state auction processes” that could result in the “potential funding of duplicative broadband networks....”¹⁰ Verizon further acknowledged that grant of the waiver “will help to ensure efficient allocation of resources” and speed the deployment of broadband in unserved areas.¹¹

Commenters further noted that New York is positioned well to drive the successful deployment of broadband infrastructure once the State and federal programs are aligned through the waiver. The State already has an operative auction process, an extensive understanding of local broadband needs, and the necessary funding to work in partnership with the FCC to ensure that broadband infrastructure is deployed in rural communities. New York is also able to work with existing partners to ensure strong participation in the auction given that it already has solicited interest for the affected territories; to avoid duplicative capital spending as a result of its extensive and proprietary mapping efforts; and, to ensure success of the endeavor through its massive \$500 matching commitment. Haefele TV, Inc., among others, praised the successes of the reverse auction program implemented by ESD in New York, commending ESD for being “extremely capable” of conducting such a program. Importantly, New York also would ensure

⁹ See *Connect America Fund et al.*, WC Docket Nos. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17669 (2011), aff’d sub nom., In re: FCC 11-161, 753 F.3d. 1015 (10th Cir. 2014) (“*USF/ICC Transformation Order*”).

¹⁰ FairPoint Comments at p.1.

¹¹ Verizon Comments at p.3.

that both USAC and the FCC have the proper oversight of such a partnership structure once implemented by ensuring relevant federal requirements are maintained.

III. OPPONENTS OF THE PETITION RELIED ON FACTUAL AND LEGAL INACCURACIES

While there was overwhelming support in favor of an expedited grant of the waiver, two commenters raised certain objections to the Petition. These criticisms came from The Wireless Internet Service Providers Association (“WISPA”) and ViaSat, a provider of satellite services. As discussed more fully below, the Commission should quickly dispose of these objections as they are based on factual and legal inaccuracies regarding New York’s waiver request and fundamental misunderstandings of the public interest benefits that would result from grant of the waiver.

A. New York Is Not Seeking a Block Grant of CAF Funding

At the outset, both WISPA and ViaSat incorrectly claim that grant of the waiver would result in the block grant of CAF funding to ESD and the State of New York. These claims, which were the primary legal basis for their opposition to the Petition, are based on a fundamental misunderstanding of New York’s waiver request. In reality, New York is *not* seeking a block grant of CAF funding to ESD or any other state agency. The Petition instead seeks to have CAF funding directly allocated to carriers in New York in coordination with the State’s broadband program. To be clear, grant of the waiver would result in the allocation of CAF funding by the Universal Service Administrative Company (“USAC”) directly to carriers in New York. This allocation would be undertaken pursuant to standard USAC funding processes and in accordance with all relevant requirements. This is the same process applicable to all other carriers receiving CAF funding and is entirely consistent with FCC policies and precedent,

especially given that USAC would administer the CAF funds and have extensive oversight of funded carriers.¹² Of particular importance, no New York State governmental agency or entity would receive the CAF funding at any time after grant of the waiver.¹³

In making this incorrect argument, ViaSat and WISPA also ignore the numerous protections that New York proposed to ensure that allocation of CAF funding in the State be undertaken in accordance with relevant FCC requirements. For example, USAC only would allocate CAF funding to carriers in the census blocks the FCC determined to be eligible for the CAF auction (e.g., those that lack 10/1 Mbps broadband service, *inter alia*). Second, the allocation of CAF funding in New York would not exceed the reserve price for an eligible census block in the period specified by the FCC. Carriers receiving CAF funds also would abide by various FCC regulations governing the use of the funds. These would include obtaining designation as an eligible telecommunications carrier (“ETC”) prior to the receipt of CAF funds, meeting or exceeding CAF buildout requirements and service benchmarks, and complying with the Commission’s reporting and administrative requirements for receipt of CAF funding. Finally, ESD would provide the Commission with any funding materials submitted to the State by broadband providers prior to the award of CAF funds so that the Commission can confirm that the proposal satisfies Commission requirements. As noted in the Petition, compliance with these commitments would be a condition to Commission grant of the waiver.

As set forth in detail in the Petition, grant of the waiver would enable carriers to “step into the shoes” of Verizon by means of New York’s existing auction process. The creation of

¹² See *Federal-State Joint Board on Universal Service*, Third Report and Order, 13 FCC Rcd 25058 at para 17 (noting that universal service funding must be administered by USAC and subject to strict oversight).

¹³ Given that ESD will not receive any of the CAF funding, it would have no obligation to obtain designation as an eligible telecommunications carrier as suggested by WISPA. See WISPA Comments at p.2.

strong viable competitors in an incumbent's territory would be feasible because of the substantial upfront funding that the State has dedicated for the deployment of broadband in rural communities, coupled with the promise of ongoing support through the CAF Program. Nonetheless, as noted above, the FCC must still confirm that a successful bidder in the New York auction qualifies for CAF funding before the funding can be awarded to the carrier. This allows the FCC to maintain oversight and enforcement for CAF funds awarded pursuant to the waiver through its ongoing direct relationship with the carriers.

B. Grant of the Waiver Would Result in the Allocation of a Modest Amount of CAF Funding to New York

WISPA and ViaSat further confuse the facts by inaccurately stating the financial amounts that New York carriers would receive through grant of the waiver. WISPA mistakenly claims that carriers in New York would receive \$170.4 million in annual CAF support. They go on, in sensational terms, to state that this leaves less than \$45 million for all other states and territories participating in the auction. In fact, this is wholly inaccurate. As stated in the Petition, grant of the waiver would provide carriers in New York with \$170.4 million in *total* CAF funding. This is the exact amount of CAF funding that Verizon declined within New York State alone (\$28.4 million per year over the six-year term of the CAF offer obligation). ViaSat similarly misstates the amount of funding New York carriers would receive by claiming that they would receive “about 13 percent” of the total funding available in the upcoming auction.¹⁴ This is also inaccurate. In fact, New York carriers would receive approximately 8 percent of the total funding available in the upcoming auction upon grant of the waiver (\$170 million out of a total

¹⁴ ViaSat Comments at p.6. For its part, WISPA is even more inaccurate in claiming that the amount available to New York carriers would represent “nearly 80 percent” of the total amount of funding available in the upcoming auction. WISPA Comments at p.5.

of \$2.15 billion). As noted below, the foregoing 8 percent is approximately one-half of what New York would have received on a percentage basis had Verizon accepted the CAF funding originally offered in the State.

Based largely on these inaccurate financial claims, WISPA and ViaSat further argue that New York is seeking to “divert...a significant percentage” of CAF funds to the State. In doing so, they blur the facts to argue that grant of the waiver would result in New York receiving more than its fair share of CAF funding. As with their other arguments, this is also inaccurate. In fact, grant of the Petition would result in New York carriers receiving far less than they potentially could obtain in the upcoming nationwide CAF auction. As the Commission is aware, the Wireline Competition Bureau has established preliminary reserve prices for all of the eligible census blocks in the upcoming auction. The Bureau set the total reserve prices for eligible New York census blocks at nearly \$299 million in aggregate over an 10-year period, assuming New York carriers were able to secure funding in all eligible blocks at the reserve price levels. Grant of the Petition thus would allocate only 57 percent of this aggregate funding to carriers in the State (\$170 million in aggregate, out of the aforementioned total of \$299 million). New York is willing to accept a reduced level of CAF funding because of the overwhelming public benefit from aligning these two auctions, the harm that comes from two separate uncoordinated processes and the urgent timing challenges discussed in the Petition, which make the need to align the federal and state broadband funding programs extremely acute.

As it relates to the amount of funding available in other states where the price cap carrier declined CAF funding, New York’s waiver request also is very reasonable. The \$28.4 million in annual funding declined by Verizon in New York represented approximately 15 percent of the amount declined by all price cap carriers (\$28.4 million of annual support offered to Verizon in

New York State, out of a total declined amount of \$175 million in annual support declined by carriers on a nationwide basis). As discussed above, however, carriers in New York would receive only 8 percent of the aggregate funding available nationwide in the upcoming auction upon grant of the waiver (\$170 million in aggregate of a total \$2.1 billion in aggregate nationwide). Contrary to the claims of WISPA and ViaSat, therefore, other states could actually benefit from grant of the Petition as additional CAF funding would be made available in the auction. Grant of the Petition would ensure that even more CAF funding could potentially be used to bring broadband to unserved communities in many states across the country. New York is able to accept a reduced level of potential CAF funding as a result of the substantial State funding it has dedicated for broadband deployment and the alignment of these two processes.

C. New York's Broadband Program is Technology Neutral

In an attempt to further obscure the public interest benefits of the Petition, both WISPA and ViaSat lastly claim that grant of the Petition would favor certain terrestrial-based technologies at the expense of satellite services.¹⁵ This argument misstates the requirements of the New York broadband program, which is open to funding all forms of broadband service. Satellite and wireless companies are fully eligible for participation in the State's broadband funding program and, in fact, New York has recently held meetings with executives at such companies regarding potential participation in the program. Of particular importance, wireless providers in the State supported the waiver request. For instance, Hudson Valley Wireless, a fixed wireless operator providing service in the State, supported the waiver request, noting that New York's broadband program is offering a "better technical solution" for rural New York

¹⁵ See ViaSat Comments at p.5 (arguing that the New York broadband program "would make funding available only to provider using specific terrestrial technologies...even where other technologies (e.g., satellite) would be far more efficient).

communities.¹⁶ This support from a local fixed wireless operator is especially noteworthy given that the company stated that the structure proposed in the Petition “could create a model state-federal partnership that deals real results for New York residents.”¹⁷

Equally important, WISPA’s and ViaSat’s arguments implicitly assert that CAF funding should not be used to deploy high-speed, fiber- or cable-based broadband services to rural areas because such services are too expensive. As noted in the Petition, however, grant of the waiver could potentially facilitate the deployment of fiber-based broadband services to New York communities *without any incremental CAF funding* and far earlier than would be possible absent the waiver.

Grant of the Petition thus is undeniably in the public interest as it would speed the deployment of better broadband services, at a lower investment cost to the FCC, to unserved New York communities far sooner than would be possible absent the waiver.

IV. THE COMMISSION SHOULD ACT QUICKLY TO FACILITATE THE DEPLOYMENT OF BROADBAND TO RURAL NEW YORK COMMUNITIES FOR THE FIRST TIME

As discussed in the Petition, it is only through coordination with New York’s broadband auction that the CAF can best achieve its goal of funding the deployment of high-quality broadband services to rural communities in New York. The Commission should move quickly to align the federal and state broadband funding processes or risk losing a historic opportunity to bring broadband infrastructure to unserved New York territories for the first time. As the Commission is aware, many of these territories include rural and tribal communities that have gone without broadband for many years and face resulting economic, social, and educational

¹⁶ Comments of Hudson Valley Wireless at p.1.

¹⁷ *Id.*

disadvantages. As Clarkson University noted in its comments, these disadvantages impact “children attending school, businesses looking to start in a rural area, and hamlets and villages seeking to offer amenities” to residents and visitors.

With this background in mind, it is clear that the Commission should not, and must not stand by and allow the continued lack of broadband to leave these communities further behind in today’s broadband-connected world. The widespread support in the initial round of comments unquestionably confirmed that grant of the Petition would facilitate the deployment of higher quality broadband services, at a lower cost to the FCC, far sooner than would be possible without the waiver. The coordination of the federal and state broadband programs made possible through grant of the waiver thus would result in many public interest benefits without any corresponding public interest harms.

V. CONCLUSION

New York State respectfully submits that the lengthy record developed in this proceeding warrants rapid grant of the requested waiver. As the initial comments noted, good cause exists for grant of the waiver as it would facilitate the deployment of broadband infrastructure to rural New York communities and ensure the most cost effective and efficient use of CAF funding.

Respectfully submitted,

By:

/s/ Jeffrey S. Nordhaus

Jeffrey S. Nordhaus
Empire State Development
Executive Vice President, Innovation and
Broadband
633 Third Avenue
New York, NY 10017

Clifford M. Sloan
John M. Beahn
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005

Counsel to Empire State Development